

No. 2765

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN NATIONAL BANK (a corporation),  
*Plaintiff in Error,*

VS.

BANK OF BANDON (a corporation),  
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

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Filed this.....day of May, 1916.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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### Statement of the Case.

This is an action by the Bank of Bandon, defendant in error to recover the sum of \$5887.78 of and from the American National Bank, plaintiff in error arising out of the failure of the American National Bank to promptly notify the Bank of Bandon of the refusal of the drawee of a draft for \$6,000 that such draft had been dishonored. The case was tried by a jury, and the verdict was against the American National Bank for the full amount sued for.

The proposition of law involved in this case is—  
Was the admitted negligence of the plaintiff in error the proximate cause of the loss sustained by

the defendant in error, or was the loss inevitable by reason of the insolvency of the drawer of the draft in question?

Plaintiff in error asserts that such loss was inevitable and not proximately caused by its negligence.

Defendant in error contends that such loss was solely due to the negligence of plaintiff in error.

The facts in this case are for the most part undisputed.

They may be briefly stated as follows:

The Bank of Bandon organized under the laws of the State of Oregon and engaged in a general banking business at Bandon, Oregon, received, on December 15th, 1913, a draft from the Alfred Johnson Lumber Company in words and figures following to wit:

“\$6,000.00                      Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. Bartlett.  
Treas.”

(Record pages 16, 42.)

On the same day, December 15th, 1916, the Bank of Bandon endorsed on the back of said draft, the following:

“Pay to the order of the American National Bank, San Francisco, Cal. All prior endorse-

ments guaranteed. Bank of Bandon, Bandon, Ore.

F. J. Fahy,  
Cashier."

(Record page 16),

and immediately forwarded the said draft to the American National Bank its correspondent conducting a banking business in San Francisco.

The American National Bank received the said draft on December 19th, 1913, and notified the Bank of Bandon that it had been presented to and accepted by the Robert Dollar Company of San Francisco.

As a matter of fact, the draft had not been accepted by the Robert Dollar Company on the 19th of December, 1913, or at any other time. (Record page 17.)

The American National Bank had made a mistake in informing the Bank of Bandon that the draft had been so as aforesaid accepted, and did not discover such mistake until December 29th, 1913. (Record page 28.)

As soon as the American National Bank discovered such mistake it immediately by telegraph and in writing informed the Bank of Bandon that the Robert Dollar Company had refused to honor the draft. (Record page 28.)

But the Bank of Bandon declined to accept the return of the draft claiming that it had on December 15th, credited said draft to the Alfred Johnson Lumber Company and had paid out on said notice

of acceptance nearly the full face of the draft, and that the notification sent it by the American National Bank on the 29th day of December, 1913, of the error of said American National Bank came too late for the Bank of Bandon to save itself from loss, because of the fact that the Alfred Johnson Lumber Company became insolvent shortly after December 29th, 1913. (Record page 29.)

During the period of time between December 15th and December 29th, 1913, the Alfred Johnson Lumber Company, had placed on board the "Grace Dollar" a vessel belonging to Robert Dollar Company about \$12,000 worth of lumber, and the Bank of Bandon claims that it could and would have attached this cargo of lumber if it had known that the draft had not been accepted by the Robert Dollar Company, and thus secured the amount of the draft; but because of the dereliction of the American National Bank it lost its opportunity of levying an attachment upon said cargo of lumber. (Record page 48.)

The cargo of lumber was sold by the Robert Dollar Company for some \$12,000 and that sum was applied in partial satisfaction of a large claim that the Robert Dollar Company had against the Alfred Johnson Lumber Company. But notwithstanding such application the Alfred Johnson Lumber Company was still indebted to the Robert Dollar Company in the sum of \$95,359.46. (Record page 78.)

All of the matters of law and of fact revolve about one proposition namely: Was the proximate

cause of the loss sustained by the Bank of Bandon due to the failure of the American National Bank between December 19th and December 29th to inform the former bank that the draft had not been accepted by the Robert Dollar Company; or, would the Bank of Bandon have sustained the loss in question regardless of such failure, on the part of the American National Bank to so inform said Bank of Bandon?

Upon the strength of its belief that the Robert Dollar Company would honor the draft of the Alfred Johnson Lumber Company, the bulk of the money represented by the draft was paid out by the Bank of Bandon on the order of the Alfred Johnson Lumber Company *before* the draft reached the American National Bank, and *before* it could have been presented for acceptance to the Robert Dollar Company. So that the Bank of Bandon would have lost the face of the draft if the American National Bank had reported promptly the fact of no acceptance of the draft, unless it could and would have subjected sufficient of the assets of the Alfred Johnson Lumber Company to the lien of an attachment. (Record pages 44, 50, 51.)

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### Assignment of Errors.

First. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:



“Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted.

The Court. What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all.”

(Record pages 69 and 70.)

Second. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination wherein he was testifying concerning the dealings of the Robert Dollar Company with the Alfred Johnson Lumber Company and wherein the following question was put to him:

“How did the affairs stand at that date—between those two dates, between December 15th and December 29th?

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.”

(Record page 68.)



Third. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:

“Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?”

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD. As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted.”

(Record page 69.)

Fourth. The Court erred in delivering the following instruction to the jury:

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—It means such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclu-

sion, together with all of the other evidence in the case in determining whether it was insolvent."

(Record page 126.)

Fifth. The Court erred and misled the jury by giving the following instruction:

"It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in insolvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency."

(Record page 129.)

Sixth. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-Seven Dollars and Seventy-Eight Cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-Seven Dollars and Seventy-Eight Cents (\$5,887.78),

you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied. *Jefferson Co. Savings Bank v. Hendrix*, 1 L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686; *Brown v. Peoples Bank*, 52 L. R. A. (N. S.) 660, 663; Notes."

(Record page 133.)

Seventh. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation; that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corpora-

tion, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness, of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78), and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted."

(Record pages 133 and 134.)

Eighth. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by

some other act over which defendant had no control.”

(Record page 135.)

Ninth. The Court erred in refusing to deliver to the jury the following instruction:

“You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied.”

(Record pages 135-136.)

Tenth. The Court erred in refusing to deliver to the jury the following instruction:

“You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the



defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken."

(Record pages 138 and 139.)

Eleventh. The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred

Johnson Lumber Company of what action it had taken with reference to the presentation of the draft."

(Record pages 141-142.)

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### Points and Authorities.

First. The Court erred in sustaining the objection of plaintiff to the question propounded R. Stanley Dollar, a witness for defendant, on his direct examination as follows:

"Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?"

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 4.

The COURT. What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all."

(Record pages 69 and 70.)

The error consisted in this: The question was intended to establish the fact that the Alfred Johnson Lumber Company was actually insolvent at the very time that it claimed that the Bank of Bandon would have subjected the cargo of cedar to the lien



of its attachment, and that if such attachment had been levied, then the Robert Dollar Company would have thrown the Alfred Johnson Lumber Company into involuntary bankruptcy. This would have had the effect to dissolve the attachment and leave the claim of the Bank of Bandon unsatisfied.

Second. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination wherein he was testifying concerning the dealings of the Robert Dollar Company with the Alfred Johnson Lumber Company and wherein the following question was put to him:

“Q. How did the affairs stand at that date—between those two dates, between December 15th and December 29th?

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.”

(Record page 68.)

The error consisted in this. The American National Bank sought by this question to obtain an answer from the witness who was in a position to know, that the Alfred Johnson Lumber Company was hopelessly insolvent during that period of time, and if so it would not have been possible for the Bank of Bandon to have realized on an attachment suit.

Third. The Court erred in sustaining the objection of plaintiff to the question propounded the witness R. Stanley Dollar on his direct examination as follows:

“Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?”

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD. As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted.”

(Record page 69.)

The error consisted in this. The books of the Alfred Johnson Lumber Company were competent to show whether the company was insolvent, and the refusal of the Court had the effect of producing upon the minds of the jurymen the idea that the question of the insolvency of the Alfred Johnson Lumber Company was a matter of no importance. The prejudice to the plaintiff in error would be in making it appear that the American National Bank would be liable to the Bank of Bandon solely because it was negligent in not sending prompt notice of the dishonor of the draft, when it is the law that the dereliction of the American National Bank must have been the proximate cause of the loss sustained by the Bank of Bandon.

Fourth. The Court erred in delivering to the jury the following instruction:

“There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent.”

(Record page 126.)

The error of the foregoing instruction consisted in this. The jury was led to believe that the opinion of Mr. Dollar as to the insolvency of the Alfred Johnson Lumber Company was of no value, even though it was plain from the evidence that by reason of the fact that his company was the heaviest creditor of the Alfred Johnson Lumber Company he was in a position to know that the latter company was hopelessly insolvent on December 15th, 1913, and subsequent thereto, and because of said knowledge the Robert Dollar Com-

pany would have thrown the Alfred Johnson Lumber Company into bankruptcy if the Bank of Bandon had sought to seize by way of attachment the only asset of the Alfred Johnson Lumber Company—the cargo of cedar.

Fifth. The Court erred in delivering to the jury the following instruction:

“It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in insolvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor’s claim without actually putting him into insolvency.”

(Record page 129.)

The error of the foregoing instruction consisted in this. The jury were told in effect that they could disregard the evidence before them tending to show that the Alfred Johnson Lumber Company was insolvent because of something that might possibly happen by which the insolvent might be relieved.

Sixth. The Court erred in refusing to give the following instruction to the jury:

“You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred John-

son Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of five thousand eight hundred eighty-seven dollars and seventy-eight cents (\$5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of five thousand eight hundred eighty-seven dollars and seventy-eight cents (\$5,887.78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied. *Jefferson Co. Savings Bank v. Hendrix*, 1 L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686."

The error of such refusal consisted in this. The law as to defendant's liability was partly contained in this instruction, and if it had been given to the jury, defendant would not have been prejudiced by the lower Courts refusal to give it, and what we have said regarding this instruction applies to each of the instructions asked for by plaintiff in error, next following.

The Court erred in refusing to deliver to the jury the following instruction:

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corpo-



ration, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation, that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corporation, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of five thousand eight hundred and eighty-seven dollars and seventy-eight cents (\$5,887.78), and sufficient in amount from which said five thousand eight hundred and eighty-seven dollars and seventy-eight cents (\$5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on Decem-

ber 19th, 1913, that said draft had been accepted.”

The Court erred in refusing to give the following instruction:

“You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant’s act or omission, and not by some other act over which defendant had no control.”

The Court erred in refusing to give the following instruction:

“You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied.”



The Court erred in refusing to give the following instruction:

“You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken.”

The Court erred in refusing to give the following instruction:

“You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual rela-

tion even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft."

All of the instructions which plaintiff in error asked the Court to deliver to the jury on behalf of the plaintiff in error and which have just been referred to contained the entire law of the case as shown by the evidence; for, there was but one proposition of law involved, and that was: *what was the immediate, direct, and proximate cause of the loss sustained by the defendant in error?* And such proposition of law was dependent upon the presentation of the fact to the jury under proper instructions that there were no available assets of the Alfred Johnson Lumber Company which the Bank of Bandon could have seized and retained by means of an attachment suit in satisfaction of its claim.

There is no question but that the Alfred Johnson Lumber Company was insolvent shortly after the draft reached the American National Bank, for the amended answer of the Bank of Bandon admits and charges "that shortly after said 29th day of December, 1913, the said Alfred Johnson

Lumber Company a corporation became and remained, and ever since has been and still is, insolvent and unable to pay its debts." (Record pages 18 and 19.) And because of the insolvency of the Alfred Johnson Lumber Company shortly after December 29th, 1913, the Bank of Bandon asserts that it was unable to save itself from loss by means of attachment or otherwise. (Record pages 18 and 19.)

As proof of the correctness of this contention of the Bank of Bandon, it is only necessary to examine the composition agreement upon the part of the creditors of the Alfred Johnson Lumber Company, which was prepared within two weeks following the 29th day of December, 1913, showing that it owed approximately \$147,000 and had not a single available asset. (Record pages 78, 79, 80.)

This being the financial condition of the Alfred Johnson Lumber Company *subsequent to December 29th*, it follows that unless its financial affairs were considerably better on December 19th, 1913, then it was insolvent on this latter date as well. And if it was bankrupt on December 19th, 1913, then it is too plain for argument that the Bank of Bandon would have been in no better position to save itself from loss than it was shortly after December 29th, 1913.

And right here it might be well for this Court to consider that at the very time that the Bank of Bandon claims it was prevented from securing itself from loss of said draft amounting to \$6000.00, the

Alfred Johnson Lumber Company was indebted to said bank in the further sum of \$5000. This clearly appears in and by the composition agreement of the creditors of said lumber company. (Record page 78.)

An examination of the record discloses the fact that no change in its affairs had taken place between the two dates referred to materially affecting its status. The only difference between the condition of the Alfred Johnson Lumber Company on December 15th from what it was on December 29th was this: On the former date it had \$12,000 worth of assets, a cargo of cedar aboard the "Grace Dollar" a vessel belonging to the Robert Dollar Company, the heaviest creditor of the Alfred Johnson Lumber Company. (Record page 79.) This was the only asset of the company. Against this lone asset it owed every item contained in the composition agreement, aggregating as we have said, over \$147,000 plus \$12,000, the value of the cargo. The Robert Dollar Company having sold the cargo and reduced its claim against the Alfred Johnson Lumber Company by that amount. So, that instead of the Alfred Johnson Lumber Company being indebted to the Robert Dollar Company in the sum of \$95,359.46, only as per the composition agreement it owed the Robert Dollar Company, approximately \$107,000 before the sale of the cargo of cedar. (Record pages 78 and 79.)

In other words, on December 15th, 1913, or shortly thereafter, the only asset that the Alfred Johnson

Lumber Company had was a \$12,000 cargo of cedar, which was appropriated by one creditor, leaving the company without any assets at all and liabilities aggregating over \$147,000. If, on December 15th, 1913, the Alfred Johnson Lumber Company owed approximately \$147,000 and \$12,000 or \$159,000 with only one available asset of the value of \$12,000 was not the company hopeless bankrupt on that day? Was its status materially altered any on December 29th, when it owed \$147,000 and had *no* asset?

There is no escape from the proposition that notwithstanding the admitted negligence of the American National Bank, the Bank of Bandon did *not lose a dollar of its money by reason of such negligence.*

The Bank of Bandon had paid out nearly the full face of the draft, as we have said, before the 19th day of December 1913, and before any negligence upon the part of the American National Bank had taken place, and would surely have been unable to have saved itself from loss by means of an attachment levied on the 19th day of December, 1913, or at any other time in the month of December, 1913.

We are aware that the witness Kronenberg, the president of the Bank of Bandon, testifies positively that he would have attached the \$12,000 cargo of cedar whether he knew the lumber company was solvent or insolvent, except for the negligence of the American National Bank in failing to notify his



bank of the dishonor of the draft in question, but as a sensible banker he would have done nothing of the kind. (Record page 48.) He must have known that the cargo of lumber was aboard the "Grace Dollar". He must have known that the Alfred Johnson Lumber Company was largely indebted to the Robert Dollar Company. He surely knew that the cargo of lumber could not be attached on the "Grace Dollar" without the knowledge of the Robert Dollar Company. He could not have believed that the Robert Dollar Company would stand idly by, and allow one creditor to seize the only asset the lumber company had and appropriate it to the liquidation of its own claim. He must have known that the Robert Dollar Company would have thwarted the efforts of his bank by throwing the Alfred Johnson Lumber Company into bankruptcy. That such action would have brought about the dissolution of the attachment.

The very fact that the Robert Dollar Company appropriated the whole cargo in partial liquidation of its own claim, proves that it was sensible enough to look out for its own interests, and it is simply inconceivable that it would have ceased to do so, merely because the Bank of Bandon had brought an attachment suit.

Counsel for plaintiff in error, therefore, contend that there is no question but that the course above indicated is the one that any sensible business man would have pursued.

But in addition to this the plaintiff in error sought to show that the Robert Dollar Company was willing to prove that it would have taken the course above indicated and would have prevented the Bank of Bandon from seizing the cargo of lumber for its own exclusive benefit, but Judge Van Fleet refused to permit the witness, Stanley Dollar of the Robert Dollar Company to make any statement as to what the action of his company would have been in the premises. (Record pages 69-70.)

This was palpable error. The witness Stanley Dollar had a right to say what his company would have done under the circumstances.

The witness Kronenberg of the Bank of Bandon was accorded that privilege without objection.

We cannot see why Stanley Dollar should not have been permitted to exercise the same privilege given to Mr. Kronenberg and tell us what his company would have done.

Counsel for plaintiff in error insist therefore, that the American National Bank could not prove its case because of the rulings, comments and instructions of the lower Court on this branch of the case, and in consequence thereof the jury was misled and misdirected to the prejudice of the American National Bank.

The principal point in the case from the standpoint of the American National Bank was the insolvency of the Alfred Johnson Lumber Company



at the time the draft in question was drawn. And notwithstanding the fact that the record shows conclusively that the Alfred Johnson Lumber Company was hopelessly insolvent Judge Van Fleet seemed to make use of every occasion to minimize its importance.

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#### AUTHORITIES.

*Notwithstanding the collecting bank may have been negligent, yet, if by reason of the insolvency of the person liable upon the paper, an action against such person would have afforded no protection by reason of such insolvency, the collecting bank can not be held in damages.*

The following authorities support this principle:

Jefferson County Savings Bank v. Hendrix,  
1 L. R. A. (n. s.) 246, and case note;

Jefferson County Savings Bank v. Hendrix,  
14 L. R. A. (n. s.) 686;

Brown v. Peoples Bank, 52 L. R. A. (n. s.)  
608, note at page 660, "Necessity of proving damage".

First National Bank v. Buckhannon Bank,  
80 Md. 275, 27 L. R. A. (o. s) 332;

Stowe v. Bank of Cape Fear, 14 N. C.  
(3 Dev. L.) 408;

First National Bank v. Fourth National  
Bank, 6 C. C. A. 183, 56 Fed. 967;

- Givan v. Bank of Alexandria, 47 L. R. A. (o. s.) 270;  
 Crawford v. Louisiana State Bank, 1 Mart. (n. s.) 214;  
 Second National Bank v. Bank of Alma, 99 Ark. 386, 138 S. W. 472;  
 Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (n. s.) 1167;  
 Industrial Trust, Title and Sav. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45;  
 Citizens Bank v. Houston, 98 Ky. 139, 32 S. W. 397.

Having shown that the Alfred Johnson Lumber Company was actually bankrupt when it drew its draft upon the Robert Dollar Company on the 15th day of December, 1913, and having shown then that if the Bank of Bandon had commenced an attachment suit against the cargo of the "Grace Dollar" at any time during the month of December, 1913, such attachment would have caused the Robert Dollar Company to have forced the Alfred Johnson Lumber Company into involuntary bankruptcy, it follows that the Bank of Bandon would have gained no advantage or preference by reason of such attachment.

Under these circumstances the admitted negligence of the American National Bank did not contribute proximately or remotely to the loss sustained by the Bank of Bandon.

The judgment should, therefore, be reversed.

Dated, San Francisco,

May 15, 1916.

Respectfully submitted,

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